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# Ho Ken Seng v Progressive Insurance Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(I)–4–07 OF 2012(B)

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ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, HASAN LAH AND JEFFREY TAN FCJJ

10 JANUARY 2013

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*Bankruptcy — Capacity of bankrupt — Competency to maintain action — Appeals against dismissal of applications to strike out bankruptcy notice, service and creditor's petition and against adjudication and receiving orders — Failure to obtain sanction of Director General of Insolvency — Whether appellant competent*

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*to prosecute his appeal without first obtaining sanction of DGI — Whether s 38(1)(a) of the Bankruptcy Act 1967 applied when s 92(2) of the same Act was invoked*

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Upon obtaining judgment in the sum of RM1,963,488.33 against the appellant, the respondent proceeded with bankruptcy proceedings. The appellant filed an application to strike out or set aside the bankruptcy notice, the service thereof and the creditor's petition in bankruptcy proceedings filed against him by the respondent. When the application was dismissed by the senior assistant registrar, the appellant filed an appeal to the judge in chambers

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(encl 26). Before encl 26 could be heard, the respondent obtained adjudication and receiving orders ('AORO') against the bankrupt. The appellant then filed an appeal against the AORO to the judge in chambers (encl 29). Subsequently, both encls 26 and 29 were heard by the judge and dismissed. The appellant appealed to the Court of Appeal. In the meantime the respondent filed a notice

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of motion to strike out the appellant's appeals on the grounds that he was incompetent to maintain the appeals as he had not obtained the sanction of the Director General of Insolvency ('DGI') pursuant to s 38(1)(a) of the Bankruptcy Act 1967 ('the Act'). The appellant argued that no sanction was required and that his appeals were lodged to challenge the bankruptcy orders

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made against him, pursuant to s 92(1) of the Act, which conferred upon the court the power to 'review, rescind or vary any order made by it under its bankruptcy jurisdiction'. The Court of Appeal held that the appellant was not competent to maintain the appeals and thus struck out the appeals. The majority of the Court of Appeal were of the view that the steps taken by the

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bankrupt in filing and prosecuting the two appeals clearly came within the ambit of maintaining an action under s 38(1)(a) of the Act and so required the previous sanction of the DGI. However, the dissenting judge in the appeal took the view that the test to determine whether the prior sanction of the DGI should be obtained in a given case was as propounded by the High Court in *Re*

*Khoo Kim Hock* (*Khoo*'s case) ie if the application involved property as defined in the Act, then, to the extent the property vested in the DGI, by reason of the applicant being a bankrupt, prior sanction of the DGI was necessary but in all other cases such sanction was not necessary. The appellant obtained the leave of the court to appeal against the majority decision of the Court of Appeal. It was the appellant's case that his right to appeal under s 92 of the Act was a statutory right that could not be the subject of the dictate of the DGI and that the interpretation of s 38 of the Act was correctly made in *Khoo*'s case.

**Held**, allowing the appeal with costs:

(1) There were divergent views expressed by the lower courts on the proper construction and applicability of s 38(1)(a) of the Act vis-à-vis a bankrupt. However, after careful consideration of the contradictory judgments of the High Court in *Bathmani Suppiah v Southern Finance Company Bhd* and *Re Lim Tai Nian ex p Kewangan Utama Bhd* the reasoning of the High Court judge in the latter case was preferred. As such, the decisions in *Low Kok Tuan ex parte Arab Malaysia Merchant Bank Bhd, Bathmani Suppiah v Southern Finance Company Bhd* and such other cases that followed them were no longer the law and were overruled (see paras 22 & 26).

(2) In addition, s 38(1)(a) of the Act should not be given too extensive an interpretation. While the word 'action' therein should refer to civil action or civil proceeding in court, it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. The scope of s 38(1)(a) should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors and should not be relevant when a bankrupt invoked s 92(2) of the Act. This was in agreement with the decision in *Khoo*'s case and the minority judgment of the Court of Appeal in this case (see paras 27–29).

(3) Further, the DGI in the present case took the stand that sanction was not required for the appellant to appeal against the bankruptcy order made against him. If the DGI said that no sanction was required from him, there was no basis for the respondent to insist on sanction. Thus, as the merits of this appeal had not been heard by the Court of Appeal the present case ought to be remitted and heard by another panel of the Court of Appeal (see paras 33–34).

**[Bahasa Malaysia summary**

Setelah memperolehi penghakiman berjumlah RM1,963,488.33 terhadap perayu, responden telah memulakan prosiding kebankrapan. Perayu telah memfailkan permohonan untuk membatalkan atau mengetepikan notis kebankrapan, penyampaiannya dan petisyen pemiutang dalam prosiding

kebankrapan yang difailkan terhadapnya oleh responden. Apabila permohonan ditolak oleh penolong kanan pendaftar, perayu telah memfailkan rayuan kepada hakim dalam kamar (lampiran 26). Sebelum lampiran 26 dapat didengar, responden telah memperoleh perintah-perintah penghukuman dan penerimaan ('PPPP') terhadap si bankrap. Perayu kemudian telah memfailkan rayuan terhadap PPPP tersebut kepada hakim dalam kamar (lampiran 29). Berikutan itu, kedua-dua lampiran 26 dan 29 telah didengar oleh hakim dan ditolak. Perayu telah membuat rayuan kepada Mahkamah Rayuan. Sementara itu responden telah memfailkan notis usul untuk membatalkan rayuan-rayuan perayu atas alasan bahawa dia tidak kompeten untuk mengekalkan rayuan-rayuan itu kerana tidak mendapat sanksi Ketua Pengarah Insolvensi ('KPI') menurut s 38(1)(a) Akta Kebankrapan 1967 ('Akta tersebut'). Perayu berhujah bahawa tiada sanksi diperlukan dan bahawa rayuan-rayuannya telah dibuat untuk mencabar perintah-perintah kebankrapan yang dibuat terhadapnya, menurut s 92(1) Akta tersebut, yang memberikan kuasa kepada mahkamah untuk 'review, rescind or vary any order made by it under its bankruptcy jurisdiction'. Mahkamah Rayuan memutuskan bahawa perayu tidak kompeten untuk mengekalkan rayuan-rayuan itu dan dengan itu membatalkan rayuan-rayuan tersebut. Majoriti Mahkamah Rayuan berpendapat bahawa langkah-langkah yang diambil oleh si bankrap yang memfailkan dan memulakan dua rayuan itu jelas dalam skop mengekalkan tindakan di bawah s 38(1) Akta tersebut dan oleh itu memerlukan sanksi terdahulu KPI. Walau bagaimanapun, hakim yang menentang dalam rayuan itu berpendapat bahawa ujian untuk menentukan sama ada sanksi terdahulu KPI patut diperoleh dalam kes itu adalah seperti yang diputuskan oleh Mahkamah Tinggi dalam kes *Re Khoo Kim Hock* ('kes *Khoo*') di mana jika permohonan melibatkan hartanah sebagaimana ditafsirkan dalam Akta tersebut maka setakat mana hartanah itu diberikan di bawah kuasa KPI, oleh sebab perayu seorang bankrap, sanksi terdahulu adalah perlu tetapi dalam semua kes lain sanksi sedemikian adalah tidak perlu. Perayu memperoleh kebenaran mahkamah untuk merayu terhadap keputusan majoriti Mahkamah Rayuan. Adalah kes perayu bahawa hak rayuannya di bawah s 92 Akta tersebut adalah hak statutori tidak boleh menjadi perkara di bawah arahan KPI dan bahawa tafsiran s 38 Akta tersebut telah diputuskan dengan betul dalam kes *Khoo*.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Terdapat pendapat berbeza yang dinyatakan oleh mahkamah bawahan berhubung pembentukan dan pemakaian wajar s 38(1)(a) Akta tersebut berhubung seorang bankrap. Walau bagaimanapun, setelah pertimbangan sewajarnya terhadap penghakiman-penghakiman bercanggah Mahkamah Tinggi dalam kes-kes *Bathmani Suppiah v Southern Finance Company Bhd* dan *Re Lim Tai Nian ex p Kewangan Utama Bhd*, alasan hakim Mahkamah Tinggi dalam kes *Re Lim Tai Nian*

*ex p Kewangan Utama Bhd* adalah yang diterima pakai. Oleh itu, keputusan-keputusan dalam kes *Low Kok Tuan ex parte Arab Malaysia Merchant Bank Bhd, Bathmani Suppiah v Southern Finance Company Bhd* dan kes-kes lain sebegini yang mengikut bukan lagi undang-undang terpakai dan dibatalkan (lihat perenggan 22 & 26).

(2) Tambahan pula, s 38(1)(a) Akta tersebut tidak patut diberikan tafsiran yang terlalu luas. Manakala perkataan 'action' di sini patut merujuk kepada tindakan sivil atau prosiding sivil di mahkamah, ia patut dihadkan kepada tindakan baru dan berasingan dan bukan yang sama di mana kebankrapan diperoleh. Skop s 38(1)(a) patut terhad kepada perkara baru dalam tindakan yang boleh menjejaskan aset atau hak milik si bankrap yang telah diniatkan untuk pengagihan kepada pemiutang-pemiutangnya dan tidak patut relevan apabila si bankrap menggunakan s 92(2) Akta tersebut. Ini adalah sejajar dengan keputusan kes *Khoo* dan penghakiman minoriti Mahkamah Rayuan dalam kes ini (lihat perenggan 27–29).

(3) Bahkan, KPI dalam kes ini mengambil pendirian bahawa sanksi tidak diperlukan untuk perayu membuat rayuan terhadap perintah kebankrapan yang dibuat terhadapnya. Jika KPI mengatakan bahawa tiada sanksi diperlukan daripadanya, maka tiada asas untuk responden mendesak untuk sanksi itu. Dengan itu, oleh kerana merit rayuan ini tidak didengar oleh Mahkamah Rayuan kes ini patut dikembalikan semula dan didengar oleh panel lain di Mahkamah Rayuan (lihat perenggan 33–34).]

**Notes**

For cases on competency to maintain action, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2945–2949.

**Cases referred to**

*Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427; [2000] 2 CLJ 650, HC (overd)

*Besime Kallaba v Bashkim (Brian) Bylykbashi* (2006) 265 DLR (4th) 320, CA (folld)

*Boaler v Power* [1910] 2 KB 229, CA (refd)

*Chua Tin Hong Ex parte Castrol (M) Sdn Bhd, Re* [1997] 3 CLJ Supp 174, HC

*Khoo Kim Hock, Re* [1974] 2 MLJ 29 (folld)

*Lim Tai Nian; ex p Kewangan Utama Bhd, Re* [2001] 4 MLJ 78; [2002] 1 CLJ 41, HC (folld)

*Low Kok Tuan ex parte Arab Malaysia Merchant Bank Bhd, Re* [1997] 4 CLJ 185, HC (overd)

*Noble (A Bankrupt) In re* [1964] 3 WLR 206, CA (refd)

*Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan* [2009] 4 MLJ 201; [2009] 4 CLJ 34, CA (refd)

*Sardar Mohd Roshan Khan v Perwira Affin Bank* [2010] 4 MLJ 285; [2010] 2 CLJ 661, FC (refd)

**Legislation referred to**

Bankruptcy Act 1967 ss 38, 38(1)(a), 92, 92(1), (2), 105(1)
Bankruptcy Rules 1969 rr 89, 161, 195
Rules of the Court of Appeal 1994 rr 4, 76

**Appeal from:** Civil Appeal No B-03-(IM)-82 of 2010 (Court of Appeal, Putrajaya)

*SS Muker (GK Ganesan, Daljeet Singh Sachdev and S Singh Sagoo with him) (Daljeet Sachdev & Co) for the appellant.*
*M Menon (Jaffar & Menon) for the respondent.*

**Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):**

## INTRODUCTION

**[1]** On 5 July 2012 this court granted leave to the appellant to appeal against the majority decision of the Court of Appeal delivered on 11 November 2011.

**[2]** The leave question allowed reads:

> whether an undischarged bankrupt when exercising his rights under Section 92 of the Bankruptcy Act 1967 to review, rescind or vary any order made by the Court under its bankruptcy jurisdiction is required to obtain the previous sanction of the Director General of Insolvency pursuant to Section 38(1)(a) of the Act.

**[3]** In the course of his submission we posed a question to learned counsel for the appellant on the scope of the leave question. Thereupon learned counsel agreed, without objection from learned counsel for the respondent, that it should be amended to read thus:

> whether an undischarged bankrupt when exercising his rights under Section 92(2) of the Bankruptcy Act 1967 to *appeal* any order made by the Court under its bankruptcy jurisdiction is required to obtain the previous sanction of the Director General of Insolvency pursuant to Section 38(1)(a) of the Act. (Amendments in bold).

**[4]** It is therefore from the perspective of the amended question that we

render this judgment.

BRIEF BACKGROUND FACTS

**[5]** On 20 March 1990 the respondent obtained judgment against the appellant in the sum of RM1,963,488.33 under Civil Suit No D1-22–145 of 1990. And based on the judgment sum together with accrued interest and costs the total sum came up to RM2,835,179.38 upon which the respondent filed a bankruptcy notice ('BN') and served it on the appellant. Thereafter a bankruptcy petition ('BP') was filed and served on the appellant.

**[6]** On 28 February 2005 the appellant filed an application to strike out or set aside the BN and the BP including the services of the same. On 8 January 2007 the senior assistant registrar ('SAR') dismissed the application with costs. Dissatisfied with the dismissal the appellant filed an appeal to the judge in chambers.

**[7]** Meanwhile on 16 August 2007 the respondent obtained a receiving order and adjudication order ('RO and AO') against the appellant.

**[8]** On 22 August 2007 the appellant appealed to the judge in chambers against the grant of the RO and AO. Subsequently, both appeals to the judge in chambers were dismissed on 11 March 2010.

**[9]** On 9 April 2010 the appellant filed a notice of appeal to the Court of Appeal. In turn, on 12 July 2011, the respondent filed a notice of motion to strike out the notice of appeal pursuant to rr 4 and 76 of the Rules of the Court of Appeal 1994. The basis of the application was that the appellant had no locus standi to pursue the appeal by reason of s 38(1)(a) of the Bankruptcy Act 1967 ('the Act').

**[10]** On 11 November 2011 the Court of Appeal by a majority judgment allowed the application to strike out the notice of appeal. It was held that 'the steps taken by the bankrupt in filing and prosecuting these two appeals as adumbrated above clearly come within the ambit of maintaining an action in s 38(1)(a) ie the requirement for the previous sanction of the DGI'. The reasoning in *Re Khoo Kim Hock* [1974] 2 MLJ 29 was not followed. That case was perceived by the majority judgment as dealing with annulment of bankruptcy orders under ss 92(1) and 105(1) of the Act. Further, it was held that s 38(1)(a) should prevail over s 92 since the former is specific while the latter is general.

**[11]** Meanwhile, the minority judgment held that 'the test propounded by

Azmi J when properly applied enables a bankrupt to challenge all orders made by a Bankruptcy Court in the exercise of its bankruptcy jurisdiction including appeals as in this case and even applications to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the official assignee'.

**[12]** Now, in *Re Khoo Kim Hock* Mohd Azmi J (as he then was) held that:

> Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something — either real or personal — which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in ss 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the official assignee before a bankrupt can seek relief under those provisions. Under s 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purposes he should first obtain the sanction of anyone. This is also the case where an application is made to the court under ss 92(1) and 105(1) of the Act.

CONTENTIONS OF PARTIES:

**[13]** The argument of learned counsel for the appellant may be summarised as follows:

(a) 'that to appeal, review, rescind or vary any order made by the court under its bankruptcy jurisdiction under s 92 of the Bankruptcy Act 1967 is not a 'proprietary right' that forms part of the estate of the bankrupt. Consequently it is not subject to s 38';

(b) that the word 'action' in s 38 does not include the 'personal right of the bankrupt in appealing against the RO and AO or annulment' of the same;

(c) that the 'right of appeal under s 92 is a statutory right' and such right cannot be the subject of the dictate of the director general of insolvency; and

(d) that the interpretation of s 38 was correctly made in *Re Khoo Kim Hock*.

**[14]** Learned counsel for the respondent argued that the present statutory rules such as rr 89, 161 and 195 of the Bankruptcy Rules 1969 do not give a bankrupt the right to appeal without the sanction of the Director General of

Insolvency ('DGI'). He went on to say that s 38(1)(a) of the Act applies to a bankrupt who may wish to appeal the grant of AO and RO made against him.

**[15]** Learned senior federal counsel who appeared for the DGI supported the submission that sanction is not required for a bankrupt to prosecute his appeal on the grant of RO and AO made against him.

DECISION OF THIS COURT

**[16]** For convenience the relevant statutory provisions of the Act are reproduced herein.

Section 38(1)(a):

> (1) Where a bankrupt has not obtained his discharge —
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

Section 92:

> (1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
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> (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.
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> (3) For the purposes of this section the Director General of Insolvency shall be deemed to be aggrieved by the refusal of any application made by him to the court.

Section 105(1):

> 105(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

**[17]** The main issue for consideration in this case is therefore whether the appellant is competent to prosecute his appeal without first obtaining the sanction of the DGI by reason of s 38(1)(a) in which the crucial phrase is 'incompetent to maintain any action …'.

**[18]** The majority judgment of the Court of Appeal held that he was not competent. Such conclusion was influenced by the reasoning that the words 'any action' in the section were interpreted to mean civil actions or civil proceedings and include the filing of a notice of appeal, an application for stay of the bankruptcy proceedings, an application to set aside a default judgment upon which the bankruptcy proceedings are founded and a counterclaim (see *Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan* [2009] 4 MLJ 201; [2009] 4 CLJ 34 (CA).

**[19]** Although the decision of the Court of Appeal in *Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan & Another Appeal* was subsequently reversed by this court in *Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khyam Enterprise) v Perwira Affin Bank (formerly know as Perwira Habib Bank Malaysia Bhd) and another appeal* [2010] 4 MLJ 285; [2010] 2 CLJ 661 (FC) it was inconsequential to the majority judgment in this case which maintained that this Court in *Khoo Kim Hock* did not rule on the issue of locus standi and thus the earlier ruling by the Court of Appeal in *Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan* remained intact. The majority judgment further opined that this court after holding that the annulment order was to operate retrospectively, only ordered that the matter be 'remitted to the Court of Appeal for the same corum to hear and decide on the substantive issues of this appeal based on the principles as determined that the annulment of the appellant's bankruptcy acts retrospectively'. And that the remittance was done because the 'Court of Appeal did not make any finding on the appeal in respect of Rayuan Sivil Mahkamah Persekutuan No 02(f)-28 of 2009(W) (Rayuan Sivil Mahkamah Rayuan No W-02–722 of 2007) since the appellant has no locus standi without the sanction from the official assignee'.

**[20]** With respect we are of the view that it is implicit in the said judgment of this court (*Sardar Mohd Roshan Khan*) that the issue of lack of locus standi is a non-starter. It would have been futile to remit that case if this court had concurred with the Court of Appeal on the issue of locus standi. Further, it also makes no sense to require the sanction of the DGI. The grant of the annulment order placed the appellant in that case to a position as if he were never a bankrupt.

**[21]** Similarly, if a bankrupt succeeds in his appeal to strike out or set aside the BN and the BP including the service of the same and/or to set aside the RO and AO made against him the effect should also be the same, that is, he should not have been made a bankrupt in the first place (see: *In re Noble (A Bankrupt)* [1964] 3 WLR 206). As such, there would have been no reason for him to require the sanction of the DGI to appeal. Accordingly, had the majority

judgment of the Court of Appeal in this case considered further the judgment of this court in *Sardar Mohd Roshan Khan* it might have come to a different conclusion.

**[22]** As regards s 38(1)(a) there are divergent views expressed by the lower courts on its proper construction and applicability vis a vis a bankrupt. But we note that some of the views were premised on different facts and circumstances such as applications to set aside default judgments upon which bankruptcy proceedings were commenced, applications for stay of bankruptcy proceedings or applications made pursuant to s 92(1) of the Act which is for 'review, rescind or vary any order made'.

**[23]** In respect of s 92(2) of the Act in which we are particularly concerned with, we note that views expressed on it are quite limited. Two contradictory judgments of the High Court come to mind.

**[24]** In *Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427; [2000] 2 CLJ 650 (HC) the presiding learned judge said this at p 430 (MLJ); p 650 (CLJ):

> In my judgment it is trite law, that upon a person being adjudged a bankrupt all his affairs are vested with the official assignee. I am mindful of the case of *Khoo Kim Hock* [1974] 2 MLJ 29 which merely says that the prohibition of s 38(1)(a) of the Bankruptcy Act 1967 does not exclude a bankrupt from applying for a review, rescission, or variation of an order of bankruptcy under s 92(1) or s 105(1) of the Bankruptcy Act 1967, but the case is silent on the bankrupt's capacity to appeal, or for that matter to apply to stay proceedings, without the sanction of the official assignee. This issue was equally ventilated by my learned brother Dato' Low Hop Bing J in the case of *Low Kok Tuan ex-parte Arab Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185. Like my brother judge I am equally of the view, that this deliberate omission by the legislature in regard to appeals or stay in s 92(1) and s 105(1) of the Bankruptcy Act, would mean only one thing, that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained. That being the case, I hold for the present the appellant lacks the legal capacity to lodge the appeal.

**[25]** But in *Re Lim Tai Nian; ex p Kewangan Utama Bhd* [2001] 4 MLJ 78; [2002] 1 CLJ 41 learned presiding judge opined otherwise and said this at pp 83–84 (MLJ); p 45 (CLJ):

> Clearly then, on the authority of *Re Khoo Kim Hock* an appeal by an undischarged bankrupt is not caught by s 38(1) and therefore no prior sanction of the official assignee is required. Section 92 is in substance the same as the English s 108 where the bankrupt in *In re Baron* was able to appeal without any sanction. Now s 92 is not concerned only with adjudication orders only but with 'order made … under its

bankruptcy jurisdiction' and 'orders in bankruptcy matters'. The plain and simple meaning of those terms would include, for example, order of stay or refusal of stay or order of extension or refusal of extension of time to do sometime. Therefore, I am unable to agree with *Re Low Kok Tuan* which, though it did not disagree with *Re Khoo Kim Hock*, decided that an undischarged bankrupt cannot appeal against an order refusing a stay of the bankruptcy petition. After all, the right to appeal is not a chose in action that can be vested in the official assignee as said in *Re Khoo Kim Hock*. For those reasons too, I am unable to agree with Bathamani. At the hearing of the bankruptcy petition, the official assignee is required to state whether he supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt can never appeal against an order made against him, no matter if there is injustice in the making of the order. Such a construction of the law should not be had. For that reason too I am unable to agree with the said two decisions. Therefore, I am of the view that an undischarged bankrupt has a right to appeal against any order made by the court in exercise of its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so.

**[26]** Having read and reread the two judgments and having given them our careful and anxious consideration we are inclined to agree with the reasoning of the learned judge in *Re Lim Tai Nian ex p Kewanqan Utama Bhd*. We therefore rule that the decisions in *Re Low Kok Tuan ex parte Arab Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185, *Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427; [2000] 2 CLJ 650 and such other cases that followed them are no longer the law and we overrule them.

**[27]** In addition, in our view s 38(1)(a) should not be given too extensive an interpretation.

**[28]** While we agree that the word 'action' therein should refer to civil action or civil proceeding in court (see *Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174), it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. And we would think that the scope of s 38(1)(a), other than the saving clause therein, should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors (see: *Boaler v Power* [1910] 2 KB 229).

**[29]** As such, s 38(1)(a) of the Act is not relevant when a bankrupt, an aggrieved person, invokes s 92(2) of the same Act. To that extent we agree with the decision in *Re Khoo Kim Hock* and the minority judgment of the Court of Appeal in this case.

**[30]** It would be most unfair and unconscionable if a person is being disabled and incapacitated, unless he obtains sanction from the DGI, to challenge the very action that caused the disability and incapacitation. It would tantamount to denying him his right of access to justice and probably his constitutional right of appeal.

**[31]** Indeed we would think that the rationale in the case of *Besime Kallaba v Bashkim (Brian) Bylykbashi* (2006) 265 DLR (4th) 320, though a Canadian vexatious litigant case, can be adopted and applied to this bankruptcy case. In that case this is what EA Cronk and RG Juriansz JJA said:

> The issue, then, is whether a vexatious litigant order operates to preclude an appeal therefrom to this court, absent leave to appeal. We do not think that the effect of a s 140(1) order extends so far as to require leave to appeal from the very order that declares a person to be a vexatious litigant and restricts his or her right to access the courts.
>
> …
>
> This court generally will require leave to appeal where a litigant seeks to initiate or continue litigation after a vexatious litigant order has been made against the litigant. However, no case was cited in argument before us in support of the proposition that leave to appeal is similarly required when the proposed appeal is from a vexatious litigant order itself. To the contrary, this court has entertained appeals from vexatious litigant orders without the requirement of leave to appeal.
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> 34 We conclude that leave to appeal the vexatious litigant order was not required. Accordingly, it presents no bar to the determination of the appeal therefrom on the merits.

**[32]** It should also be remembered that upon the bankruptcy of a person, all his assets are vested with the DGI who in turn is expected, as is his statutory duty, to protect the interest of the creditors of the bankrupt. As such the DGI would be put in an awkward or in a conflict of interest situation when he is being asked to sanction a step to be taken by a bankrupt that may run counter to the interest of the creditors.

**[33]** And probably it is for such reason that the senior federal counsel who appeared for the DGI in this case stood up to inform this court that sanction is not required for the appellant to appeal against the bankruptcy order made against him. If the DGI said that no sanction is required from him we find no basis for the Respondent to insist on sanction.

**[34]** Thus for the reasons given above we answer the question posed as amended in the negative. And since the merit of this appeal has not been heard by the Court of Appeal we hereby, order that it should be remitted and heard by another panel of the Court of Appeal.

**[35]** We therefore allow this appeal with costs and call upon the parties to address us on the quantum for costs.

*Appeal allowed with costs.*

Reported by Kohila Nesan